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March 18, 2005

Mr. Miles Mayhew
Land Use Planner
City of Seattle
Department of Planning and Development
700 Fifth Avenue, Ste 2000
PO Box 34019
Seattle, WA 98124-4019

Dear Mr. Mayhew:

Subject: Comments on the Draft Environmentally Critical Areas Ordinance Update, sent via e-mail and U.S. mail

Thank you for the opportunity to comment on the proposed Draft Environmentally Critical Areas Ordinance update. Futurewise appreciates the hard work by the Department of Planning and Development and supports the significant improvements to the existing critical areas regulations. However, we urge you to make refinements to protect the green spaces and water quality of Seattle and its water bodies. These refinements are also necessary to achieve the adopted policies of the City of Seattle and to meet the high expectations of Seattle residents and property owners. Futurewise (formerly 1000 Friends of Washington) is a statewide public interest group working to preserve working farms and forests while making cities and towns great places to live. We have members across the state with a strong membership in the City of Seattle.

Improvements We Strongly Support

We support many elements of the proposed environmentally critical areas update, including:

- The designation of Fish and Wildlife Conservation Areas in SMC 25.09.020(D) is excellent and we strongly support protecting these important habitats.
- We strongly support provisions and incentives to provide for better marine and riparian buffers during redevelopment.
- We appreciate and strongly support the approved wetland mitigation ratios and provisions in proposed SMC 25.09.160. These improvements will help protect the functions and values of critical areas.

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Summary of Recommendations

We do, however, strongly urge the city to make improvements to the proposed environmentally critical areas update to strengthen protections for water quality and habitat. Further strengthening the following elements will help maintain Seattle as a great place to live, will help implement the City of Seattle's adopted policies, and will bring the proposed update into compliance with the Growth Management Act. The most important improvements include:

- Adopt marine riparian area buffer provisions to protect Seattle's important salt water shorelines with appropriate provisions for port facilities, marinas, docks, and to maintain views. The science shows that these shorelines are important fish and wildlife habitats. This is required by City of Seattle policy and the Growth Management Act.
- Adopt a buffer for type 1 waters. These include Seattle's important salmon rivers such as the Duwamish River and its lakes. This is required to protect the functions and values and water quality of rivers and lakes. This is required by City of Seattle policy and the Growth Management Act.
- Increase the type 2 through 5 stream buffers. The proposed buffers in proposed SMC 25.09.200(A)(3)(d)(1) are currently too narrow to provide adequate protection for salmon streams, other stream functions and values, and the wildlife functions of riparian corridors. This is required by City of Seattle policy and the Growth Management Act.
- Proposed SMC 25.09.020(C) and SMC 25.09.160(B)(1)'s provisions exempting wetlands smaller than 100 square feet and category IV wetlands smaller than 1,000 square feet from protection must be eliminated. This is required by City of Seattle policy and the Growth Management Act.
- Proposed SMC 25.09.160(B)(1) & (E)'s wetland buffers of 100 to 50 feet are inadequate to protect wetland functions and values, and the averaging provisions can reduce them further. We recommend that you adopt buffers similar to the Washington State Department of Ecology's Alternative 3 buffers. Again, adequate wetland buffers are required by Seattle policy and the Growth Management Act.
- Proposed SMC 25.09.160(B)'s criteria for when wetlands can be impacted are inadequate to protect wetlands; especially Seattle's very limited but very important tidal and riparian wetlands. This provision is needed to comply with adopted City of Seattle policy and the Growth Management Act.
- Strengthen proposed SMC 25.09.200(D) for fish and wildlife conservation areas. Currently it states that "the Director <u>may</u> condition development on parcels containing wildlife habitat <u>to encourage</u> preserving contiguous fish or wildlife habitat corridors." Underlining added. SMC 25.09.200(D) must require conditions to protect wildlife habitat. Again, this is needed to comply with adopted City of Seattle policy and the requirements of the Growth Management Act.

- The City of Seattle needs to designate tsunami hazard areas and adopt development regulations to prevent hazards to life and property in these areas. Again, this is needed to comply with the Growth Management Act.

In view of the serious legal deficiencies of the proposed environmentally critical regulations, we strongly urge the city to enter into negotiations with the city's environmental community. We think this is preferable to the likely alternatives.

The following sections lay out why the Growth Management Act requires the periodic review of development regulations, including Seattle's Environmentally Critical Areas regulations. We then detail the scientific, policy, and legal reasoning that underlie our recommendations.

Why the 2004 Update is Important for the City of Seattle

We appreciate that the City of Seattle is undertaking its review and update of the Environmentally Critical Areas regulations. The Growth Management Act requires regular seven year updates of development regulations, including those for critical areas, for many reasons. Consider three:

- Communities change. Seattle is a very different place then it was when the city adopted its critical areas regulations in 1990.
- We know more. Since Seattle adopted its critical areas regulations in 1990, we have learned much about the Seattle environment and hazardous areas in the city. For example, in 2001 King County published its *Reconnaissance Assessment of the State of the Nearshore Ecosystem: Eastern Shore of Central Puget Sound, Including Vashon and Maury Islands (WRIAs 8 and 9).* This report documents the extensive fish, wildlife, and plant use of Seattle's Puget Sound shorelines. Salmon use all most all of Seattle's marine waters.[1] Eelgrass and Kelp are found along most of Seattle's shoreline outside the central waterfront.[2]
- The Growth Management Act changes. The Growth Management Act has been amended every year since it was adopted.

Requirements for the 2004 Update

The Growth Management Act, in RCW 36.70A.130(1), requires each city and county in Washington State that fully plans under the Growth Management Act "to take legislative action to review and, if needed, revise its comprehensive land use plan and development regulations to ensure the plan and regulations comply with the requirements of this chapter

[1] Williams, G.D., R.M. Thom, J.E. Starkes, J.S. Brennan, J. P. Houghton, D. Woodruff, P.L. Striplin, M. Miller, M. Pedersen, A. Skillman, R. Kropp, A. Borde, C. Freeland, K. McArthur, V. Fagerness, S. Blanton, and L. Blackmore. J.S. Brennan, Editor. *Reconnaissance Assessment of the State of the Nearshore Ecosystem: Eastern Shore of Central Puget Sound, Including Vashon and Maury Islands (WRIAs 8 and 9)* Figure 18, Salmonid Use of the Nearshore Environment (Report prepared for King County Department of Natural Resources, Seattle, WA: 2001). A copy of this entire report is included on the CAO on a CD previously provided to staff and enclosed with the paper copy of this letter.

[2] *Id.* in Figure 15 Eelgrass and Kelp.

…." This means that each county and city must review their comprehensive plan and development regulations to ensure they comply with the requirements of the Growth Management Act.[3] Since the City of Seattle's critical areas regulations do not fully comply with the GMA, they must be revised by an ordinance adopted by the City Council.[4]

The legislature adopted this requirement in 1997 and the original deadline was September 1, 2002.[5] The plans and development regulations were to be updated every five years.[6] In 2002, the deadline for the City of Seattle was extended over two years to December 1, 2004 and the update interval increased to seven years.[7]

Detailed Recommendations

Saltwater shoreline buffers are required and should be at least 150 feet wide

Newly adopted City of Seattle Comprehensive Plan Goal LG36 provides in full:

> LG36 Protect the ecological functions and values of wetlands, and fish and wildlife habitat conservation areas; prevent erosion from development on steep slopes; and protect the public health, safety and welfare in landslide-prone, liquefaction-prone and flood-prone areas.

Further, City of Seattle Comprehensive Plan Policy LU225 provides in full:

> LU225 Regulate development in and near designated fish and wildlife habitat conservation areas in order to protect the remaining native wildlife species and significant fish populations, especially salmonids.

As this section will show, Seattle's salt water shorelines are important fish and wildlife habitats, including salmon habitat. This section will also clearly document that a salt water buffer is needed to protect the functions and values of these important habitats.

Salt water shorelines, including the marine riparian zone, are important habitats for fish and wildlife. For example, Jim Brennan writes:

> Healthy (i.e., intact and functional) riparian systems along marine shorelines support abundant and diverse assemblages of wildlife. For

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[3] *FEARN, et al. v. City of Bothell*, Central Puget Sound Growth Management Hearings Board (CPSGMHB) Case No. 04-3-0006c Order on Motions p. *9 of 12 (May 20, 2004). The board's decisions can be found on their website: http://www.gmhb.wa.gov/central/decisions/index.html

[4] RCW 36.70A.130(1) & *FEARN, et al. v. City of Bothell*, CPSGMHB Case No. 04-3-0006c Order on Motions p. *9 of 12 (May 20, 2004).

[5] 1997 Session Laws, Chapter 429 § 10.

[6] *Id.*

[7] 2002 Session Laws, Chapter 320 § 1 & *FEARN, et al. v. City of Bothell*, CPSGMHB Case No. 04-3-0006c Order on Motions p. *8 of 12 (May 20, 2004).

> example, in our review of the 335 wildlife species known to inhabit all of King County, Washington (King County 1987; Kate Stenberg, personal communication), we identified 263 wildlife species (9 amphibians; 5 reptiles; 192 birds; 57 mammals) known, or expected to have an association with riparian habitat on marine shorelines in Puget Sound. This represents 78.5 percent of all (335) wildlife species found in King County. Many wildlife species are dependent upon riparian areas for their entire life cycle, with requirements for feeding, breeding, refuge, cover, movement, migration, and climate that are intricately interwoven into the ecological balance of riparian structure, functions, and processes. Other wildlife may only depend on riparian areas during a specific life stage, for limited periods during seasonal migrations, or simply as a migration corridor. However, regardless of the timing, the availability and condition of riparian habitat can be a determining factor in their survival.[8]

Salmon use all most all of Seattle's marine waters.[9] Many of these salmon rely on marine riparian areas for food. For example, "juvenile chinook salmon stomach contents analyzed from beach seine samples collected throughout King County shorelines in Central Puget Sound[, including the City of Seattle,] indicate a predominance of terrestrial insects in their diet."[10]

Seattle's Puget Sound saltwater shorelines have many other important functions and values. The *White Paper on Marine and Estuarine Shoreline Modification Issues* documents the importance of retaining riparian vegetation on marine shorelines to both reduce shoreline erosion, which threatens lives and property, and to protect the marine environment. The White Paper says:

> Live plant foliage and forest litter break the force of falling rain, reduce surface water runoff velocity, and increase the absorptive capacity of soil, whereas plant roots provide a fibrous web that stabilizes and anchors soil.

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[8] Jim Brennan. "Riparian Functions and the Development of Management Actions in Marine Nearshore Ecosystems" p. 11 in Lemieux, J.P., Brennan, J.S., Farrell, M., Levings, C.D., and Myers, D. *Proceedings of the DFO/PSAT sponsored Marine Riparian Experts Workshop*, Tsawwassen, BC, February 17-18, 2004. 2004. Can. Man. Rep. Fish. Aquat. Sci. No. 2680. A copy is enclosed in a separate e-mail with the filename: MREW Proceedings5.pdf. It is also on the CAO on a CD enclosed with the paper original of this letter and previously provided to staff.

[9] Williams, G.D., R.M. Thom, J.E. Starkes, J.S. Brennan, J. P. Houghton, D. Woodruff, P.L. Striplin, M. Miller, M. Pedersen, A. Skillman, R. Kropp, A. Borde, C. Freeland, K. McArthur, V. Fagerness, S. Blanton, and L. Blackmore. J.S. Brennan, Editor. *Reconnaissance Assessment of the State of the Nearshore Ecosystem: Eastern Shore of Central Puget Sound, Including Vashon and Maury Islands (WRIAs 8 and 9)* Figure 18, Salmonid Use of the Nearshore Environment (Report prepared for King County Department of Natural Resources, Seattle, WA: 2001). A copy of this entire report is included on the CAO on a CD previously provided to staff and enclosed with the paper copy of this letter.

[10] *Id.* at p. 14 & J.S. Brennan, K.F. Higgens, J.R. Cordell, and V.A. Stamatiou. *Juvenile Salmon Composition, Timing, Distribution, and Diet in Marine Nearshore Waters of Central Puget Sound in 2001-2002* pp. ii – iii & p. 3-1 (King County Department of Natural Resources and Parks, Seattle, WA: 2004). It is also on the CAO on a CD enclosed with the paper original of this letter and previously provided to staff.

> Therefore, maintenance of existing vegetation and revegetation of bare ground on bluffs with native trees, shrubs, and herbs can improve slope stability by trapping sediment and controlling surface runoff (Cox et al. 1994, Manashe 1993) (Table 9). Besides reducing erosive forces, riparian vegetation is a key element of shoreline ecological function and has a significant influence on habitat value, both in the riparian zone itself, and in adjacent aquatic and terrestrial areas (Zelo and Shipman 2000, Brennan and Culverwell in prep). Riparian vegetation contributes to maintenance of fisheries habitat and water quality, functioning as shade, cover for fish and wildlife, organic matter input, and source of insect prey (Levings et al. 1991, Thom et al. 1994a). It may have particularly high value in Puget Sound because of its contributions to marine forage fish that utilize the upper intertidal for spawning (Pentilla 2000) and to juvenile salmonids for cover and foraging (Thom et al. 1994a).[11]

For these and other reasons, adopted City of Seattle policy and the Growth Management Act require the City of Seattle to adopt development regulations to protect the functions and values of saltwater shorelines and Puget Sound.[12] In protecting these functions and values, best available science must be included in the record and must be considered substantively in the development of critical areas regulations.[13] RCW 36.70A.480(3)(b) also provides that until the Department of Ecology approves a shorelines master program under the 2003 shoreline master program guidelines, critical areas within shoreline jurisdiction must be protected through a Growth Management Act critical areas regulation that complies with the Growth Management Act.[14]

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[11] Gregory D. Williams and Ronald M. Thom. *White Paper: Marine and Estuarine Shoreline Modification Issues* p. 62 (Sequim, WA: Battelle Marine Sciences Laboratory, Pacific Northwest National Laboratory, April 17, 2001). Available at: http://www.wa.gov/wdfw/hab/ahg/marnrsrc.htm It is also on the CAO on a CD enclosed with the paper original of this letter. This report has been identified as best available science in Washington State Office of Community Development *Citations of the Best Available Science for Designating and Protecting Critical Areas* p. 23 (March 2002). This document is also on the CAO on a CD enclosed with the paper original of this letter.

[12] RCW 36.70A.172(1).

[13] *Whidbey Environmental Action Network (WEAN) v. Island County*, 122 Wn. App. 156, 171, 93 P.3d 885, 893 (2004) quoting *Honesty in Environmental Analysis & Legislation (HEAL) v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 96 Wn. App. 522, 532, 979 P.2d 864 (1999).

[14] RCW 36.70A.480(3)(b), RCW 36.70A.060, & RCW 36.70A.172(1). Also see Department of Ecology & Department of Community, Trade and Economic Development. *Questions and Answers on ESHB 1933 Critical Areas Protection Under the Growth Management Act and Shoreline Management Act* p. 4. This document can be downloaded at: Ecology's Web site at: http://www.ecy.wa.gov/programs/sea/sma/laws_rules/90-58/1933_Guidance.pdf and CTED's website at: http://www.cted.wa.gov/portal/alias__cted/lang__en/tabID__464/DesktopDefault.aspx?alias=cted&lang=en&tabID=464. It is also on the CAO on a CD enclosed with the paper original of this letter and previously provided to staff. It is in the Shoreline Management Act directory with the filename: 1933 guidance 2-17-04 w RCWs Attach1.pdf.

King County has prepared a summary of best available science for marine shorelines. This study identified buffer recommendations ranging from 100 feet to 450 along saltwater shorelines in Washington, British Columbia, and Alaska.[15]

The Growth Management Act (GMA) created three state agencies to interpret the GMA and to hear appeals alleging that cities, counties, or state agencies are in violation of the GMA. The Western Washington Growth Management Hearings Board has held that saltwater buffers should be at least 100 feet wide. The board held that "[u]nder this record, it is clear that WDFW [Washington State Department of Fish and Wildlife] and others consider 100 feet a minimum for [habitat conservation area] buffers."[16]

Since that decision, the Department of Fish and Wildlife has modified its recommendations. In a letter to the City of Anacortes, the Department of Fish and Wildlife wrote:

> For example, King County intends to apply 115-foot buffers to aquatic habitats within UGAs. The City of Edmonds recently designated 150-foot buffers on its waters designated as shorelines of the state. The City of Burien designates 125-foot buffers along its shorelines. WDFW is currently drafting marine-habitat GMA/CAO guidelines for local jurisdictions in which minimum marine riparian buffers of 150 feet in width are to be recommended. The rationale for these buffers are the same as for riparian buffers on freshwater streams and wetlands, filtration for water quality maintenance, wildlife habitat, maintenance of certain microclimate functions, beach shading, nutrient inputs (including juvenile salmonid prey items), bank stabilization, and production of woody debris.[17]

The U.S. Commission on Ocean Policy's *An Ocean Blueprint for the 21st Century Final Report of the U.S. Commission on Ocean Policy* clearly documents that over development and polluted runoff is harming our oceans.[18] Providing adequate saltwater buffers and protections for Puget Sound will be an important step in protecting and our sound and oceans.

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[15] Stephanie Brown, Terry Butler, Robert Fuerstenberg, Ph.D, Priscilla Kaufmann, Gino Lucchetti, Klaus Richter, Ph.D., Jeanne Stypula, P.E. Jennifer Vanderhoof, & James Hatch. *Best Available Science: Volume I: A Review of Science Literature* p. 7-24 (Seattle, Washington: King County Executive Report, February 2004). Available at: http://www.metrokc.gov/ddes/cao/ This report is also on the CAO on a CD enclosed with the paper original of this letter and previously provided to staff.

[16] *John E. Diehl, et al. v. Mason County*, WWGMHB Case No. 95-2-0073 Compliance Order (For Compliance Hearing # 16) p. *12, 2002 WL 2007137 p. *6 (August 23, 2002). This document can be downloaded at: http://www.gmhb.wa.gov/western/decisions/1995/95-73ComplianceOrder16.pdf

[17] Personal Communication from Daniel E. Penttila, WA Department of Fish and Wildlife to the Honorable Dean Maxwell Mayor of the City of Anacortes p. 2 (December 30, 2004).

[18] The U.S. Commission on Ocean Policy's *An Ocean Blueprint for the 21st Century Final Report of the U.S. Commission on Ocean Policy* can be downloaded at: HTTP://WWW.OCEANCOMMISSION.GOV

Based on the important functions of saltwater shorelines, the available scientific studies, the Growth Management Act case law, and Seattle's adopted policy, the buffers on Seattle's saltwater shorelines should be at least 150 feet wide. The buffers should include provisions allowing and managing port facilities, docks, marinas, and tree trimming to allow views.

Lake shore buffers are required

As we documented in the previous section, newly adopted City of Seattle Comprehensive Plan Goal LG36 and Policy LU225 call for protection of fish and wildlife habitats. Seattle's lakes are important fish and wildlife habitats. This section will document that a lakeside buffer is needed to protect these important habitats.

Lakes are Growth Management Act critical areas.[19] They provide important fish and wildlife habitats. This is acknowledged on page 4 of the city's *Draft Best Available Science Review*.[20] RCW 36.70A.480(3)(b) provides that until the Department of Ecology approves a shorelines master program under the 2003 shoreline master program guidelines, critical areas within shoreline jurisdiction must be protected through a Growth Management Act critical areas regulation that complies with the Growth Management Act.[21] Our review of the proposed regulations did not find any buffers to protect lakes although it is possible we missed them. King County's best available science report documents the benefits of buffers to lakes and the fish and wildlife that use them.[22]

Like salt water buffers, lake buffers are mandated by City of Seattle policy. City of Seattle Comprehensive Planning Goal EG6 calls for maintaining or improving water quality through land use policies. This is one of the important functions of such a buffer. City of Seattle Comprehensive Plan Goal LG36 and Policy LU225 call for protection of fish and wildlife habitats again an important function of buffers on lakes.

A buffer is required for Type 1 waters

Seattle needs to adopt a buffer for type 1 waters. These include Seattle's important salmon rivers such as the Duwamish River.[23] This is required to protect the rivers' functions and values and water quality. It is also required by City of Seattle Comprehensive Plan Goal LG36 and Policy LU225 that call for protection of fish and wildlife habitats and the

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[19] WAC 365-190-080(5)(a)(vi).
[20] Department of Planning & Development. *DRAFT Environmentally Critical Areas Code Best Available Science Review* p. 4 (February 2005).
[21] RCW 36.70A.480(3)(b), RCW 36.70A.060 & RCW 36.70A.172(1). Also see Department of Ecology & Department of Community, Trade and Economic Development. *Questions and Answers on ESHB 1933 Critical Areas Protection Under the Growth Management Act and Shoreline Management Act* p. 4.
[22] Stephanie Brown, Terry Butler, Robert Fuerstenberg, Ph.D, Priscilla Kaufmann, Gino Lucchetti, Klaus Richter, Ph.D., Jeanne Stypula, P.E. Jennifer Vanderhoof, & James Hatch. *Best Available Science: Volume I: A Review of Science Literature* p. 7-24 – 7-26 (Seattle, Washington: King County Executive Report, February 2004).
[23] Salmon use of the Green/Duwamish River and the Ship Canal is documented on page 3 of the Department of Planning & Development. *DRAFT Environmentally Critical Areas Code Best Available Science Review* (February 2005).

Growth Management Act which requires protection for fish and wildlife habitat. In addition, newly adopted City of Seattle policy LU229 provides in full:

> LU229 Establish buffer areas adjacent to the water body on each development site that is located within a riparian corridor. Strictly limit development within buffer areas, and leave vegetation in its natural condition unless new plantings will enhance the functions of the buffer.

Note that Policy LU229 contains no exceptions for type 1 waters or, for that matter marine waters. Buffers are to be established adjacent to the water body on each development site.

As is amply documented in the Washington State Department of Fish and Wildlife's *Management Recommendations for Washington's Priority Habitats: Riparian,* buffers are needed to maintain these functions and values. A copy of this report is included on the CAO with a CD included with the original of this letter and previous provided to staff.

Wider stream buffers are needed to protect fish and wildlife habitat

City of Seattle Comprehensive Plan Goal LG36 and Policy LU225 call for protection of fish and wildlife habitats. The *DRAFT Environmentally Critical Areas Code Best Available Science Review* documents the habitat value of the city's streams. Unfortunately, the current recommended buffers in proposed SMC 25.09.200(A)3)(d)(1) for type 2 through 5 streams are too narrow to provide adequate protection for streams and the wildlife functions of riparian corridors. The important functions of these areas and the buffers needed to protect them are detailed in the Washington State Department of Fish and Wildlife's *Management Recommendations for Washington's Priority Habitats: Riparian* on the enclosed and previously provided CAO on CD.

Small wetlands must not be exempted from critical areas protections

Newly adopted City of Seattle Comprehensive Plan Policies LU223 and LU224 provide in full:

> LU223 Seek no net loss of wetland acreage, and require no net loss of wetland values or functions across the city, including, but not limited to flood control, water quantity and quality, fish and wildlife habitat, and quality of life and educational benefits. In limited circumstances, allow a wetland's functions to be replaced either on or off-site.

> LU224 Near wetlands, protect vegetation in its existing condition unless augmenting or replanting can be shown to better protect the wetland's functions.

To implement these city policies, to protect the functions and values of wetlands, and incorporate best available science into these regulations, proposed 25.09.020(C) and SMC 25.09.160(B)(1)'s provisions exempting wetlands smaller than 100 square feet and

category IV wetlands smaller than 1,000 square feet from protection must be eliminated. The approach required by city policy and the Growth Management Act is to protect these wetlands and then, if it is necessary to impact the wetland, tailor the required mitigation so that only the lost functions are replaced, taking into account temporal function loss and the limited success of wetland mitigation.

The Washington State Department of Ecology has completed its synthesis of the best available science related to wetlands. This study summarized the following important functions of small wetlands:

- The studies of the correlation of wetland size to wildlife use conflict somewhat in their findings, but most generally conclude that small wetlands are important habitats (particularly where adjacent buffer habitats are available) and that elimination of small wetlands can negatively impact local populations.

- Small wetlands provide habitat for a range of species that are not a subset of the species found in larger, more permanently inundated wetlands. Small wetlands do not just provide a smaller area for the same array of amphibian species found in larger wetlands.

- Small wetlands are very important in reducing isolation among wetland habitat patches. Smaller wetlands provide significant habitat for wildlife and affect the habitat suitability of larger wetlands by reducing isolation on the landscape.

- The presence of small wetlands reduces the distance between wetlands and thus increases the probability of successful dispersal of organisms. This, in turn, likely increases the number of individuals dispersing among patches in a wetland mosaic, thereby reducing the chance of population extinction.

- Isolated wetlands provide the same range of wetland functions as non-isolated wetlands. Isolated wetlands provide important water quantity, water quality, and habitat functions.[24]

Seattle's existing and proposed exemptions will result in the continuing loss of the important functions and values of small wetlands. This is contrary adopted city policy and Growth Management Act requirements.

[24] Sheldon, D., T. Hruby, P. Johnson, K. Harper, A. McMillan, T. Granger, S. Stanley, and E. Stockdale. *Wetlands in Washington State - Volume 1: A Synthesis of the Science* pp. 5-13 – 5-14 (Washington State Department of Ecology Publication #05-06-006. Olympia, WA: March 2005). Available from: http://www.ecy.wa.gov/pubs/0506006.pdf This document is also included on the CAO on a CD enclosed with the paper copy of this letter in the Wetlands directory.

The Growth Management Act created three state agencies to interpret the Growth Management Act and to hear appeals alleging that cities, counties, or state agencies are in violation of the Growth Management Act. The City of Seattle is in the jurisdiction of the Central Puget Sound Growth Management Hearings Board.

The Central Puget Sound Growth Management Hearings Board has held that exemptions to critical areas regulations violate the Growth Management Act, referred to as the Act below, because the Growth Management Act requires the protection of critical areas. The board writes:

> The sections cited in these legal issues do not meet the requirements of RCW 36.70A.040(3), RCW 36.70A.060(2) and RCW 36.70A.170 because they do not designate and protect critical areas. As held above regarding Legal Issue No. 2, the Act requires that all critical areas be designated and that all designated critical areas be protected. Some of the sections, such as SCC 32.10.040, are exemptions on their face, while the operation of .110(1) constitutes, in effect, an exemption of any slopes less than 33 percent.
>
> Exemption, exclusion, limitation of applicability, or other drafting mechanisms that achieve the same effect, do not constitute designation and protection of critical areas. Local governments do have discretion as to how and even the degree to which they protect, but the inescapable conclusion from a plain reading of the Act is that critical areas must be protected.[25]

The City of Seattle's exemptions for small wetlands are exactly the kind of exemption the Growth Management Act prohibits. The city must eliminate these exemptions.

The wetlands buffers are too narrow and must be widened

Proposed SMC 25.09.160(B)(1) & (E)'s wetland buffers of 100 to 50 feet are inadequate to protect wetland functions and values. As we have previously documented, this is required by the Growth Management Act and City of Seattle Policy LU223. The averaging provisions can reduce them further. We recommend that you adopt buffers similar to the Washington State Department of Ecology's Alternative 3 buffers. This alternative is described in Appendix 8-C the Washington State Department of Ecology's August 2004 *Draft Wetlands in Washington State Volume 2: Managing and Protecting Wetlands* (Washington State Department of Ecology Publication # 04-06-024) included in the wetland directory of the data CD we have previously provided to staff and enclosed with the paper copy of this letter.

[25] *Pilchuck v. Snohomish County* (*Pilchuck II*), CPSGMHB Case No.: 95-3-0047c Final Decision and Order p. *21, 1995 WL 903206, p. *21 (December 6, 1995).

The criteria for when wetlands may be impacted must be improved

City of Seattle Policy LU223 seeks no net loss of wetland acreage and requires no net loss of wetland functions and values. This later provision is also required by the Growth Management Act.[26]

Unfortunately, proposed SMC 25.09.160(B)'s criteria for when wetlands can be impacted are not up to the standard set by city policy and state law. Because of the costs of mitigation to applicants and its failure rate,[27] there should be clear standards in critical areas regulations for when wetland alterations are allowed. These standards should also recognize that certain wetland types, for example bogs fens and mature forested wetlands, are difficult or even impossible to restore.[28] This means that for high value, difficult or impossible to restore wetlands alterations should be rarely allowed. The difficulty of restoring or replacing other wetlands also means that they should be given significant protections. To do otherwise will mean the loss of wetland functions and values; this is contrary to both City of Seattle policy and the Growth Management Act.

The following section is taken from Washington State Department of Community, Trade, and Economic Development *Critical Areas Assistance Handbook: Appendix A Example Code Provisions for Designating and Protecting Critical Areas* pp. A–40 -– A–41 (November 2003). A copy of this document is included in the CAO on a CD we previously provided to staff and which is included with the paper copy of this letter. The language below was modified to reflect Seattle's update. The new material is underlined and the deleted material struck through.

25.09.160 Development standards for wetlands.

…

B. Impacts to Wetlands and Buffers.

1. ~~Development, including but not limited to grading, filling, or draining, is prohibited within or over regulated wetlands as defined in Section 25.09.020 C.~~ Uses and activities may only be allowed in a wetland or wetland buffer if the applicant can show that the proposed activity will not degrade the functions, values, and functional performance of the wetland and other critical areas.

2. Activities and uses shall be prohibited in wetlands and wetland buffers, except as provided for in this Chapter.

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[26] RCW 36.70A.172(1).
[27] See Sheldon, D., T. Hruby, P. Johnson, K. Harper, A. McMillan, T. Granger, S. Stanley, and E. Stockdale. *Wetlands in Washington State - Volume 1: A Synthesis of the Science* pp. 6-8 – 6-9 (Washington State Department of Ecology Publication #05-06-006. Olympia, WA: March 2005).
[28] Sheldon, D., T. Hruby, P. Johnson, K. Harper, A. McMillan, T. Granger, S. Stanley, and E. Stockdale. *Wetlands in Washington State - Volume 1: A Synthesis of the Science* pp. 5-13 – 5-14 (Washington State Department of Ecology Publication #05-06-006. Olympia, WA: March 2005).

3. Category I Wetlands. Activities and uses shall be prohibited from Category I wetlands, except as provided for in the public agency and utility exceptions, reasonable use exceptions, and variance sections of this Chapter.

4. Category II and III Wetlands. With respect to activities proposed in Category II and III wetlands, the following standards shall apply:

a. Water-dependent activities may be allowed where there are no practicable alternatives that would have a less adverse impact on the wetland, its buffers and other critical areas.

b. Where nonwater-dependent activities are proposed, it shall be presumed that alternative locations are available, and activities and uses shall be prohibited, unless the applicant demonstrates that:

i. The basic project purpose cannot reasonably be accomplished and successfully avoid, or result in less adverse impact on, a wetland on another site or sites in the general region; and

ii. All alternative designs of the project as proposed, that would avoid or result in less of an adverse impact on a wetland or its buffer, such as a reduction in the size, scope, configuration, or density of the project, are not feasible.

5. Category IV Wetlands. Activities and uses that result in unavoidable and necessary impacts may be permitted in Category IV wetlands and associated buffers in accordance with an approved critical area report and mitigation plan, and only if the proposed activity is the only reasonable alternative that will accomplish the applicant's objectives.

6. Full compensation for the acreage and loss of functions and values shall be provided by the applicant.

7~~2~~. When development occurs on a site containing a regulated wetland:

a. All on or offsite runoff shall be routed away from the wetland and wetland buffer;

b. The use of pesticides is prohibited in the wetland or wetland buffer unless the Director determines there is a threat to public health that may be mitigated through the use of pesticides; and

c. Direct lighting shall be directed away from the wetland and its buffer whenever possible.

Strengthen protection for wildlife habitats

Newly adopted City of Seattle policy LU225 requires the city to regulate development in and near wildlife conservation areas to protect the remaining native wildlife species. This policy is also setout in full on page 4 of this letter. The Growth Management Act has similar requirements setout in the following quotations:

> Under RCW 36.70A.060(2) and (3), the [city] is required to adopt development regulations that protect critical areas. Critical areas include: (a) wetlands; (b) areas with a critical recharging effect on aquifers used for potable water; (c) fish and wildlife habitat conservation areas; (d) frequently flooded areas; and (e) geologically hazardous areas. [RCW 36.70A.030(5)][29]
>
> ….
>
> RCW 36.70A.172(1) requires that BAS shall be included "in developing policies and development regulations to protect the functions and values of critical areas." This court held "that evidence of the best available science must be included in the record and must be considered substantively in the development of critical areas policies and regulations." [*Honesty in Environmental Analysis & Legislation (HEAL) v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 96 Wn. App. 522, 532, 979 P.2d 864 (1999).][30]
>
> ….
>
> ….[T]he GMA requires that the regulations for critical areas must protect the "functions and values" of those designated areas. [RCW 36.70A.172(1)] This means all functions and values.[31]

Unfortunately, proposed SMC 25.09.200(D) for fish and wildlife conservation areas does not comply with city policy or the Growth Management Act. Currently proposed SMC 25.09.200(D) provides that "the Director may condition development on parcels containing wildlife habitat to encourage preserving contiguous fish or wildlife habitat corridors." This is far short of the mandatory protection for wildlife habitats required by LU225 and the provisions of the Growth Management cited above. To comply with these requirements, SMC 25.09.200(D) must be changed to provide that "the Director shall ~~may~~ condition development on parcels containing wildlife habitat or their buffers to ~~encourage~~ preserve~~ing~~ the functions and values of the wildlife habitat and contiguous fish or wildlife habitat corridors. The additions are underlined and the deletions struck through.

The regulations must also provide that the measures to preserve fish and wildlife habitats shall be based on the Department of Fish and Wildlife's priority species and habitat recommendations with appropriate modifications for the specific sites. We recommend the provisions from the CTED's *Example Code Provisions for Designating and Protecting*

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[29] *Whidbey Environmental Action Network (WEAN) v. Island County*, 122 Wn. App. 156, 170, 93 P.3d 885, 892 (2004).
[30] *WEAN*, 122 Wn. App. at 171, 93 P.3d at 893.
[31] *WEAN*, 122 Wn. App. at 174 -- 175, 93 P.3d at 894.

Critical Areas included on the CAO on a CD enclosed with the paper copy of this letter and previously provided to staff.

Incorporate provisions to prevent losses of life and property in areas subject to tsunamis

The Growth Management Act requires the City of Seattle to designate and adopt regulations for geological hazards to prevent hazards to life and property.[32] Areas subject to tsunamis are a geologically hazardous area.[33]

In 2003 the Washington State Department of Natural Resources prepared the *Tsunami hazard map of the Elliott Bay area, Seattle, Washington—Modeled tsunami inundation from a Seattle fault earthquake*, by T. J. Walsh, V. V. Titov, A. J. Venturato, H. O. Mofjeld, and F. I. Gonzalez. This document, with the file name ofr03-14.pdf, is in the Tsunami Hazards subdirectory of the Geo Hazards directory of the CAO on a CD previously provided to staff and included with the paper copy of this letter.

The recent tragedy in Southeast Asian has highlighted the need to protect people and property from these lethal events. We strongly urge the city to designate tsunami hazard areas and adopt development regulations to prevent people and property from being put in harms way. It is also necessary to comply with the Growth Management Act.

Incorporate measures maintain development capacity and protect property rights

Proposed SMC 25.09.240(E) should be amended to allow the land subject to critical areas to be included in residential density calculations. This will reduce property owner concerns about critical areas and buffers and provide for appropriate residential densities in the city.

Thank you very much for the opportunity to comment. We thank the department for its continuing efforts to make Seattle a great place to live and own a business. We urge the department to make the necessary changes to come into compliance with adopted City of Seattle policy and the Growth Management Act. We also urge you to enter into negotiations with the Seattle environmental community to address the serious legal and policy issues identified by Futurewise and the other members of the community. This will result in better critical areas regulations and a better process.

Please include this letter and the CAO on CD in the record of the Environmentally Critical Areas Update. Please also include us on the notice list for public involvement opportunities, we prefer e-mail notices if that is convenient for the city. Please contact myself or Tim Trohimovich at (206)343-0681 or sydney@futurewise.org or tim@futurewise.org for additional information and to begin negotiations on these important issues.

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[32] RCW 36.70A.170 & RCW 36.70A.060.

[33] *Seaview Coast Conservation Coalition, v. Pacific County and the Washington State Department of Ecology*, WWGMHB Case No. 96-2-0010 Final Decision and Order, 1996 WL 671532, p. *3 (October 22, 1996).

Sincerely,

Sydney McComas
Urban Policy Director

cc: Diane Sugimura, Director, City of Seattle Department of Planning and Development w/enclosure

enclosure